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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

EARL W. BRYDGES, as Majority Leader and President pro tem of the New York State Senate,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NEW YORK STATE ASSOCIATION OF INDEPENDENT SCHOOLS, *AMICUS CURIAE*

Preliminary Statement

This brief is submitted, with the consent of all parties, on behalf of the New York State Association of Independent Schools ("the Association"), in support of the position

of Appellants who appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, permanently enjoining enforcement of Chapter 138 of the 1970 Laws of New York (hereafter "Mandated Services Act"). The Act provides for a fixed payment, per enrolled student, to be made to each qualifying nonpublic school in connection with its expenses for services consisting of:

> "examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Mandated Services Act § 2)

The Court below held that the Act violated the First Amendment of the United States Constitution.

Interest of Amicus

The Association is an educational corporation chartered by the Board of Regents of the University of the State of New York. Its principal stated purposes include the following:

> 1. " • • • to promote the independence and well-being of, and public regard for, the independent schools of the State of New York;"
>
> 2. " • • • to safeguard the interests of these schools in the matter of legislation and regulation;"
>
> 3. " • • • to serve as the New York State member association of the National Association of Inde-

pendent Schools"*; (New York State Association of Independent Schools, Constitution, Art. II.)

The Association's membership comprises 98 member schools, all situated in New York State. Their enrollment consists of approximately 31,500 elementary and secondary school students. Requirements for membership in the Association include: (i) "The school shall be incorporated as a non-profit institution." (ii) "Students, otherwise qualified, shall be admitted to the school without regard to race, color, religion, creed or national origin; except that, with regard to religious or denominational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, color or national origin." (iii) Scholastic accreditation. (New York State Association of Independent Schools, By-Laws, Art. 1 §§ 2.1, 2.2, 2.6, 2.7.)

Of the Association's 98 school membership, 82 have no affiliation with any religious organization. The remaining 16 have some affiliation with a religious group, and 10 of these are supported or are under the auspices of such a group.

Summary of Argument

The Mandated Services Act provides for payment of a fee from State funds to nonpublic schools for their extraction of information, required by the State from all schools, both public and nonpublic, to be delivered to the State, in the interest of insuring a sound educational system throughout the State. The Act is not a "law respecting an establishment of religion, or prohibiting the free exercise there-

*The National Association of Independent Schools, Inc. is a Massachusetts corporation which, through its State members, represents more than 750 independent schools throughout the U.S.

of", and, accordingly, does not violate the First Amendment of the United States Constitution.

Even if the Act could properly be held to violate such First Amendment in its application to nonpublic schools affiliated with a religious organization, the Act is severable and must be deemed valid insofar as it provides for payments to nonpublic schools which have no religious affiliation.

The Mandated Services Act

The Act provides that there shall be apportioned annually by the Commissioner of Education, from State funds, for payment to qualifying nonpublic schools 15¢ per school day per student for students in grades one through six; and 25¢ per school day for students in grades seven through twelve (§ 2(a)(b)). For a normal school year the annual payment per pupil would be $27 for grades one through six, and $45 for grades seven through twelve.

Qualifications for receipt of the foregoing payments are provided for under Regulations of the Commissioner of Education, Sec. 176.1 paras. "(a)" through "(g)". Paragraph "(a)" thereof specifies that all teachers serving on the staff of such a school shall have certain qualifications, and paragraph "(g)" specifies that the school shall be nonprofit. Each of the other qualifying paragraphs, namely, "(b)" through "(f)", requires the extraction and collecting by the school of State specified information and the furnishing of the resulting data to the State, as follows:

> (b) Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and *report the re-*

sults of all specific tests or examinations which may be prescribed by the commissioner.

(c) Such school, if it offers instruction at the secondary level (any of the grades seven through twelve) shall *submit annually to the State Education Department,* at such time and in such form as the commissioner may require, a *Secondary School Report* (Private Schools).

(d) Such school shall *submit annually to the State Education Department,* at such time and in such form as the commissioner may require, a *Report of Nonpublic Schools* (Basic Educational Data System).

(e) Such school shall *submit to the State Education Department,* at such times and in such form as the commissioner may require, such additional information as may be specified by the commissioner pursuant to the provisions of Education Law section 215.

(f) Such school shall maintain, in a form and manner specified by the commissioner, a register of the attendance of each pupil enrolled in the school. All such registers shall be retained by the school for a period of not less than fifty years following the close of the school year for which each such register was maintained, and shall be made available for inspection by authorized representatives of the State Education Department upon request. Summaries of such attendance registers *shall be submitted annually to the State Education Department* at such time and in such form as the commissioner shall prescribe. [Appendix to brief for Appellants Cathedral Academy et al. at 6a, 7a. (Emphasis added throughout)]

The relationship which the State payment, made on account of the extracting and delivering of the foregoing data to the State, bears to the cost of educating a child in a nonsectarian, nonpublic school, may be judged from the

following: The average cost of educating a child in such schools was, for the school year 1969-1970, $1,768 for children in kindergarten through 8th grades, and $2,234 for those in grades 9 through 12.* Thus, the $27 per student per annum paid under the Act to a qualifying school for children in kindergarten through 8th grade amounted to approximately 1.52% of the school's annual cost of educating the child, and the $45 received with respect to students in grades 9 through 12, amounted to approximately 2.01% of the school's cost in educating such a child. But for the lower court's injunction herein, the estimated aggregate payments under the Act to the Association's members would have been $671,700 for the school year 1971-72.

ARGUMENT

I

The Mandated Services Act is Constitutional.

The Association aligns itself unqualifiedly with the Appellants' contentions on this appeal, and urges that for the reasons set forth in Appellants' briefs, the Mandated Services Act makes valid provision for the specified payments from State funds to the qualifying schools under the Act. These payments are made for the extracting of information which such schools, as well as public schools, must deliver to the State, pursuant to requirements established by the State for the State's benefit in supervising and maintaining a statewide, all inclusive educational system. The Act is, accordingly, valid and enforceable and not in violation of the First Amendment of the United States Constitution.

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* The tuition charges paid for attendance at such schools averaged approximately 15% less than these costs. Vol. 1 The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 420 (The Viking Press 1973)

II

Even if the Mandated Services Act were to be held unconstitutional as applied to religiously affiliated schools, it is severable and valid as to schools without religious affiliations.

It is the further position of the Association that if this Court should determine that the Act would violate the First Amendment insofar as it permitted payments to nonpublic schools which were affiliated with religious organizations, the Act is severable as to such schools, and the Act must nevertheless be held valid and enforceable with respect to payments to nonpublic schools which qualify under the Act and which have no religious affiliation. Accordingly, the district court was in error when it enjoined all payments under the Act.

The nonsectarian schools, as to which the statute is clearly constitutional, should not be barred from receiving the funds allocated to them. Indeed, the complaint itself seeks to enjoin payments under the Act only insofar as they go "to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith" (Complaint, paragraph 17(2) in the Appendix, at 15a). Eighty-two of the Association's 98 school membership fall clearly *without* the category to which Appellees' complaint is directed. They therefore had no reason to intervene in this action, did not intervene, and their rights should not be abrogated in this proceeding.

It is well established that the question of the severability of a statute is one which is governed by state law. *Meyer* v.

Wells, Fargo & Company, 223 U. S. 298 (1912). The concept of severability, as it has developed in New York, was set forth in the opinion of then Judge Cardozo of the New York Court of Appeals in *Alpha Portland Cement Company* v. *Knapp,* 230 N. Y. 48 (1920):

> "In this state, we have gone far in subdividing statutes, and sustaining them so far as valid. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. . . . The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. (at p. 60).

It has also been recognized that the concept of severability is "especially favored in New York" [*Reitz* v. *Mealey,* 34 F. Supp. 532, 535 (S.D.N.Y. 1940) (L. Hand, C.J.) aff'd 313 U. S. 542, rehearing granted 313 U. S. 597, aff'd 314 U. S. 542 (1941)], and that the "whole tendency . . . has been to apply the principle of severance with increasing liberality." *People* v. *Mancuso,* 255 N. Y. 463, 473 (1931).

It is also clear that the absence of a severability clause in the statute itself is not significant. This Court has held that "the ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause." *United States* v. *Jackson,* 390 U. S. 570, 585 n. 27 (1968).

With both the rule and the tendency toward an increasingly liberal application of that rule in mind, it seems clear that the Mandated Services Act presents a situation in which severance should be used to save that part of the statute which is clearly valid. This is a case where there can be little question that "the legislature, if partial

invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded . . ." (Cardozo J. supra)

The Mandated Services Act recites that its purpose is "to assure that [the State's] precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life" and states that the Act will assist in providing the services necessary to this end.

The stipulation of facts in this case* shows that in 1968 there were two hundred ninety-six nondenominational nonpublic schools in New York State with an enrollment of approximately 50,000 students.** More recent statistics show that 6.5% of the students in nonpublic schools (or about 54,700 students) are in nonsectarian institutions.***

The question is then, would the Legislature have wanted to provide aid for the more than 50,000 pupils who could constitutionally receive the benefit of the payments provided for by the State, if the Legislature had realized that such payments could not be made to the remaining schools. Reason must affirm that the Legislature would certainly elect to aid those schools which it constitutionally could.

Inability to compensate for State mandated services in one area, provides no basis for concluding that the Legislature would not desire to achieve its compensation objective to the extent constitutionally permissible. Obviously the making or non-making of the State payments, would affect the level of tuition which qualified nonpublic schools must charge and, in turn, be a significant determinative factor as to whether students would be able to remain in the

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* Appendix at 91a, 92a.

** Financial Support NonPublic Schools New York State, October 1969 at 3. Exhibit I in Supplement to Appendix.

*** Vol. 1 The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 388 (The Viking Press 1973).

nonpublic school system, or must leave it, to be added to, and become a further burden on, the public school system.

An obvious objective of the legislation is to ameliorate the economic difficulties which nonpublic schools face today, and to do this in the interests of both furthering the nonpublic school component in the State's educational framework, and lessening the burden on the public school system which must inevitably result if nonpublic schools close their doors because of economic difficulties. In the terms of either of these objectives, State payments which indirectly benefit more than 50,000 students provide a significant achievement in relation to the legislative objectives manifest in the Mandated Services Act, and an achievement which it is inconceivable the Legislature would have elected to abandon merely because it could not achieve more.

If the Legislature desires to abandon its Mandated Services program because of a partial constitutional curtailment of its total purpose, the Legislature may repeal the Act. But in the absence of repeal, it would be unjustifiable for this Court to strike down so much of an Act as is clearly constitutional and is as clearly achieving the very purposes which the Legislature intended to achieve, simply because all of the benefits contemplated could not be achieved.*

The parties hereto have expressly stipulated that there are 296 nondenominational schools in New York State. We therefore urge that the 296 nondenominational schools with their more than 50,000 pupils be permitted to receive the benefits which the Legislature has provided for them.

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* It is significant that the Legislature has in the past, and over an extended period of time, enacted legislation which was expressly limited to benefiting nonsectarian, nonpublic schools. (See (1905) Laws of New York ch. 699; (1920) Laws of New York ch. 680.)

CONCLUSION

For the reasons set forth in the briefs of Appellants, the Mandated Services Act is constitutional in all respects and the judgment of the lower court should be reversed, and the complaint dismissed. If, however, this Court should hold that the statute is unconstitutional as it applies to sectarian schools, the judgment of the District Court should nevertheless be vacated as it applies to nonsectarian schools.

Respectfully submitted,

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